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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RITA KINNICK, Plaintiff and Appellant, v. SARATOGA CAPITAL, INC., Defendant and Respondent.	A122680 (Alameda County Super. Ct. No. RG07319662)

In December 2005, Rita Kinnick obtained a loan of $560,000 from Saratoga Capital, Inc. (Saratoga) secured by a deed of trust on her home. Shortly thereafter, she defaulted on the payments and Saratoga began foreclosure proceedings. On April 9, 2007, Kinnick filed a complaint alleging that Saratoga had violated the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), based on violations of the federal Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.).[1] She sought rescission of the loan and an order preventing the foreclosure. While the litigation was pending, and following proceedings in which Kinnick unsuccessfully attempted to prevent the foreclosure, Saratoga foreclosed and sold the house. Saratoga then moved for summary judgment, and Kinnick, who previously had been represented by counsel, appeared in

[1] "The Truth in Lending Act is designed 'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.' 15 U.S.C. § 1601(a). Rather than substantively regulate the terms creditors can offer or include in their financial products, the Act primarily requires disclosure." (*Barrer v. Chase Bank USA, N.A.* (9th Cir. 2009) 566 F.3d 883, 887.)

propria persona to oppose the motion. The trial court granted Saratoga's motion for summary judgment based on its evidence that it had not violated TILA in the manner alleged by Kinnick, and entered judgment for Saratoga. Kinnick appeals from that judgment. We hold that summary judgment was properly granted and therefore shall affirm.

BACKGROUND

Saratoga is a wholesale mortgage lender, meaning that it deals exclusively with mortgage brokers and does not lend directly to individuals. On December 7, 2005, Kinnick's mortgage broker solicited Saratoga for a loan on Kinnick's behalf. The broker sent Saratoga a facsimile stating, "this loan needs to close by December 19, 2005. Prudential has stated no more extensions," and that "[t]he client is looking for a 5-year term interest only at 8.99%, one-year prepayment penalty or your best offer."

Saratoga agreed to make the loan. It is undisputed that Kinnick signed the loan documents on December 19, 2005, at the office of the title company. The loan was funded on December 23 and escrow closed on December 27.

The first payment on the loan was due January 23, 2006. Kinnick made a payment on February 7 and another on March 27, but did not make any further payments. Saratoga recorded a notice of default on May 11, 2006, noting that Kinnick was delinquent by $12,185.52. Kinnick did not cure the default and Saratoga scheduled a trustee's sale for September 11, 2006. Kinnick then filed a petition in the bankruptcy court, which stayed the trustee's sale. The bankruptcy case was dismissed on November 16, and Kinnick filed a second bankruptcy petition. Saratoga petitioned for relief from the bankruptcy stay, and at a hearing on February 7, Kinnick requested an additional 60 days to sell the house. The bankruptcy court granted her the request but Kinnick did not sell the house. Saratoga rescheduled the foreclosure sale for April 11, 2007.

On April 9, 2007, Kinnick filed a complaint seeking "to enjoin foreclosure, for declaratory relief, rescission, accounting and damages." Saratoga again postponed the foreclosure sale, setting it for May 18, 2007. Kinnick's complaint alleges that Saratoga "did not disclose the terms of the [loan] transaction," that "the documents contained

blanks and were incomplete," that "she did not receive copies of the documents," that "she was legally blind and could not even see where to sign, much less the text of the documents," and that since she "did not have full and complete copies of the transaction . . . , she did not know when her payments were due." She alleges that she received information on when payments were due and payment coupons in February 2006. Kinnick "elected to rescind[] the transaction for failure to com[p]ly with the Federal [T]ruth [I]n [L]ending laws," and alleged both that she had already given Saratoga notice of her decision to rescind but that Saratoga had not responded and that she was giving notice of her election to rescind "by service of this complaint."

Kinnick stated four causes of action in her complaint. First, she sought a declaration that she "did not breach the obligation," that she "rescinded the transaction, and it is void," and that defendant "failed to comply" with TILA and the Home Ownership Equity Preservation Act (HOEPA).[2] The complaint asserts that "[s]uch a declaration is appropriate at this time so that Kinnick may determine her rights and duties before the property is sold at a foreclosure sale." She also stated a cause of action for an injunction to prevent Saratoga from selling the property, alleged a violation of the UCL, and sought an accounting.

After the trial court denied Kinnick's motion for a preliminary injunction, Saratoga foreclosed on Kinnick's home in September 2007.[3]

Saratoga then moved for summary judgment. In support of its motion it offered the following as undisputed facts. Kinnick received a loan of $560,000 from Saratoga, secured by her home. On December 15, 2005, Saratoga mailed Kinnick a "Mortgage

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[2] The purpose of the HOEPA (15 U.S.C. § 1639) which amended TILA, is "to combat predatory lending." (*In re First Alliance Mortg. Co.* (9th Cir. 2006) 471 F.3d 977, 984 fn. 1.) Although Kinnick alleges that Saratoga violated this act, she has never identified any specific provision that she alleges was violated.

[3] Kinnick did obtain multiple temporary restraining orders prohibiting the foreclosure. She appealed to this court from the ultimate denial of her request for a preliminary injunction. This court denied her request for a stay, and on October 19, 2007, following the foreclosure, dismissed the appeal as moot. (A118953.) Subsequently the trial court granted a motion expunging a notice of lis pendens that Kinnick had filed in July 2007.

Loan Disclosure Statement/Good Faith Estimate" required by California law, and a "Federal Real Estate Loan Disclosure Statement." The letter containing these documents was not returned to Saratoga. On December 16, these same documents, plus a "Notice of Right to Cancel," were sent to Old Republic Title Company with instructions to obtain Kinnick's signature on each document before closing the transaction. On December 19, Kinnick appeared at the office of the title company and signed each of the disclosure documents, acknowledging their receipt, and signed the promissory note and deed of trust. At the same time she signed the notice of her right to cancel the transaction, which stated that she had the right to do so no later than midnight on December 22, 2005. The loan was funded by Saratoga on December 23 and escrow on the transaction closed on December 27, 2005.[4]

Kinnick opposed the motion. In her opposition she stated that she no longer sought injunctive relief or an accounting. She submitted a two-page declaration stating that she did not receive Saratoga's December 15 letter enclosing the disclosure statements, that she saw the documents for the first time on December 19, that she received only one copy of the documents, and that although she was legally blind and required help in signing, she could see that there were blanks on the documents she signed. The trial court granted summary judgment, stating that "Plaintiff does not submit adequate evidence to raise a triable issue of fact with respect to any material issue." The court entered judgment for Saratoga and Kinnick timely noticed an appeal from the judgment.

DISCUSSION

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the

[4] Saratoga also based its motion for summary judgment on the ground that the action is barred by the statute of limitations. Neither the trial court nor we rely on this ground.

underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "If defendant makes this showing, plaintiff[] must show some triable issue of material fact does exist. [Citation.] Plaintiff[] 'may not rely upon the mere allegations or denials of [her] pleadings,' but must 'set forth the specific facts showing that a triable issue of material fact exists.' [Citation.] 'The party opposing the summary judgment must make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact if the moving party's evidence, standing alone, is sufficient to entitle the party to judgment. [Citations.] To avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue. [Citation.] Moreover, the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation.' [Citation.] [¶] On appeal, 'we must independently examine the record to determine whether triable issues of material fact exist.' " (*Trujillo, Inc. v. First American Registry* (2007) 157 Cal.App.4th 628, 635.)

As indicated above, Kinnick's complaint contained four causes of action but in opposing the motion for summary judgment she abandoned her causes of action seeking injunctive relief and an accounting. On appeal she makes no argument with respect to those causes of action. The foreclosure of the property having already occurred when the summary judgment motion was heard, the claims for prospective relief were by then moot. Similarly, with the foreclosure the cause of action for declaratory relief became academic insofar as it sought to determine that Saratoga had no right to foreclose.

Kinnick's opposition to the motion for summary judgment and her brief on appeal focus almost exclusively on her contention that despite the foreclosure she remains entitled to a declaration that she is entitled to rescind her promissory note and the deed of trust that has been foreclosed. She argues that "[b]y operation of law, Saratoga Capital, is required to cancel the note and security instrument and return them to Kinnick and the power of sale of the deed of trust is void. Once the loan is rescinded, the security interest

or lien becomes automatically void, by operation of law. [Citations.] The note also is voided."

"TILA requires that specific disclosures be provided to borrowers of qualifying consumer credit transactions that are secured by the borrowers' residence. Section 1635 of title 15 of the United States Code mandates that lenders clearly and conspicuously disclose to borrowers that borrowers have a right to rescind the transaction until midnight of the third business day following consummation of the transaction. (15 U.S.C. § 1635(a).)" (*Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1349 (*Lozo*).) The borrower rescinds the transaction by sending written notice to the creditor. (15 U.S.C. § 1635(a); 12 C.F.R. § 226.15(a)(2).) "If any required disclosures are not given, the borrower's right to rescind is extended from three days to *three years after the date of consummation of the transaction*. (15 U.S.C. § 1635(a) & (f); 12 C.F.R. § 226.23(a)(3) (2006).)" (*Lozo, supra,* at p. 1350.)

In opposing summary judgment, Kinnick cited *Lozo, supra,* 138 Cal.App.4th at page 1350. In *Lozo*, the court addressed the right to rescind under TILA where the borrowers had refinanced with the original lender the loan they sought to rescind, and held that" borrowers are not precluded from rescinding a consumer credit transaction that is secured by their residence and subject to TILA merely because they have already refinanced that loan." (*Id.* at p. 1347.) *Lozo* did not address whether the right to rescind continues after sale of the property. Under 15 United States Code section 1635(f), it clearly does not. The statute provides that, with certain inapplicable exceptions, "[a]n obligor's right of rescission shall expire three years after date of consummation of the transaction *or upon the sale of the property, whichever occurs first*, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter [citation] have not been delivered to the obligor." (15 U.S.C. § 1635(f), italics added.) The regulations reiterate, "If the required notice [of the right to rescind] or material disclosures are not delivered, the right to rescind expires 3 years after consummation, upon transfer of all the consumer's interest in the property, *or upon sale of the property*, whichever occurs first." (12 C.F.R. § 226.23(a)(3), italics added.; see also

Meyer v. Ameriquest Mortg. Co. (9th Cir. 2003) 342 F.3d 899, 903 ["The regulation is clear: the right to rescind ends with the sale."].) Moreover, independent of TILA, it is well established that rescission is not available to set aside a properly conducted foreclosure sale to an innocent third party. (See, e.g., *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831 ["As a general rule, the purchaser at a nonjudicial foreclosure sale receives title under a trustee's deed free and clear of any right, title or interest of the trustor. [Citation.] A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.] Once the trustee's sale is completed, the trustor has no further rights of redemption."].) Thus, summary judgment was properly granted on the cause of action seeking a declaration of Kinnick's right to rescission.

The only remaining cause of action in Kinnick's complaint was for unfair business practices under the UCL. That cause of action rests on Kinnick's claim that Saratoga violated provisions of TILA.[5] In her brief on appea,l Kinnick does not challenge the trial court's ruling on this cause of action, nor did she address it in her opposition to the motion for summary judgment. While the trial court's ruling with respect to this cause of action might be sustained on this basis alone, summary judgment on this cause of action can also be sustained on the merits. Since, as indicated above, neither injunctive nor declaratory relief remains available to Kinnick, the only form of relief she might conceivably obtain is damages, but damages cannot be recovered under the UCL. " 'While the scope of conduct covered by the UCL is broad, its remedies are limited.' [Citation.] Suits asserting statutory UCL claims are equitable actions. (*Cortez v. Purolator Air Filtration Products Co.* [(2000)] 23 Cal.4th [163,] 173.) For that reason, 'compensatory damages are not available' in such suits. (*Ibid.*)" (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1009.)

[5] Although damages may be recovered under TILA, Kinnick asserted no direct cause of action under TILA, presumably because such a cause of action would have been barred by a one-year statute of limitations. (15 U.S.C. 1640(e); see *Lozo, supra,* 138 Cal.App.4th at p. 1355.)

Therefore, it is unnecessary to consider whether Kinnick's opposition to the summary judgment motion raised a triable issue of fact regarding any of the respects in which she claimed that TILA had been violated. We note, however, that the record, while somewhat unclear in places, strongly suggests that many, if not all, of these claims lack merit. As indicated above, Saratoga submitted evidence that it had timely made the required disclosures to Kinnick by preparing and forwarding to her and to the title company a Federal Real Estate Loan Disclosure Statement and a State of California Mortgage Loan Disclosure Statement/Good Faith Estimate. These documents contained the information required by TILA (12 C.F.R. § 226.18 [listing required contents of disclosures under TILA].) The federal real estate loan disclosure form clearly states the amount of the loan, the annual percentage rate of interest on the loan, the finance charge, the amount financed, and the total amount of the payments. It also states the number of payments, the amount of each, and when they begin ("30 days after funding date.") Kinnick has not disputed the accuracy of any of these disclosures. While Kinnick contends that she did not receive the December 15 letter from Saratoga enclosing the disclosure statements, there is no evidence that Saratoga did not mail the letter to her as it asserts. Under Evidence Code section 641, "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." Moreover, although claiming she was "legally blind at the time" (a questionable assertion in view of the statement from her doctor which appears in the record that only her left eye was affected), Kinnick does not deny that she signed all of the documents associated with the loan at the title company on December 19, and that she received at that time a notice advising her of her right to rescind until midnight on December 22.

Because the record contains a copy of the promissory note signed by Kinnick with blanks for the date of funding and the dates on which payments would be due, and another copy with these blanks filled in (both having been submitted by Saratoga), it appears that the title company may have obtained Kinnick's signature on the documents before filling in these blanks and providing her with a copy of the executed documents. Even if this occurred, it does not follow that the information required had not been

disclosed to Kinnick before she signed the documents. More importantly, the blanks on the loan instruments necessarily were not filled in when Saratoga forwarded the documents to the title company because the precise dates were not yet determined. The title company was required to complete the blanks. Even if securing Kinnick's signature before the blanks were filled in was a violation of TILA, the violation was committed by the title company, not by Saratoga. It also appears that on the Federal Real Estate Loan Disclosure Statement sent to Kinnick prior to signing the documents, the boxes indicating whether there was a prepayment penalty and a right to accelerate the loan may not have been checked. However, these boxes were checked on the copies given to her on December 19. Contrary to Kinnick's argument, the requirement that certain information be provided the borrower three days prior to consummation of the transaction does not apply to this disclosure. (See 15 U.S.C. § 1639(b)(1).)

Kinnick also asserts that Saratoga violated TILA by providing her with only one copy, rather than two, of the disclosure documents. However, the only requirement imposed by TILA in this regard is that the lender provide two copies of the notice of the borrower's right to rescind. (12 C.F.R. § 226.23(b)(1).) Kinnick's declaration opposing summary judgment states only that she was provided with "[o]nly one copy of each [loan] document," but does not state that she was provided with only a single copy of the notice of the right to rescind. There is no requirement that she be provided with multiple copies of the other disclosure documents. (See generally 12 C.F.R. § 226.18.)

Kinnick's most substantive contention is that the disclosure documents omitted or misstated financial information in two respects. Neither deficiency is supported by the record.[6] Kinnick contends that the disclosure statement contained "a materially deficient good faith estimate" of the finance charges because the estimate failed to disclose some $3,100 of fees that were included in the closing statement for the transaction. However, this amount consisted of various fees such as those for title insurance and services provided by the title company that are not fees that Regulation Z, issued pursuant to

[6] Kinnick's opposition in the trial court did not raise this contention.

TILA, requires the lender to disclose. (12 C.F.R. § 226.4(c), (d).) Kinnick also contends that she was charged four days of interest on her loan that were not disclosed. The disclosure documents correctly stated that interest would run from the date of funding, which was December 23. Although the loan was funded on that date, when the loan proceeds were transferred from Saratoga's account to the escrow account at the title company, escrow on the loan did not close until December 27. Any questions regarding the delay in closing the transaction and failing to offset the four days of interest earned in the escrow account against the interest Kinnick owed on the loan relate to rights as between Kinnick and the title company. These questions do not indicate any shortcomings in the disclosure statement as to the date from which interest would be charged on the loan. (See 12 C.F.R. pt. 226 (2009), appx. supp. I, com. 18(g)-4, p. 557; *Clay v. Johnson* (7th Cir. 2001) 264 F.3d 744.)

Finally, even if there was a violation of TILA in some respect and damages were an available remedy under the UCL as they are for violations of TILA, damages could not be recovered without a showing that the damages were caused by the TILA violation. (15 U.S.C. § 1640(a)(1) [creditors who fail to comply with TILA are liable to borrowers for "any actual damage sustained by such person *as a result of the failure*" (italics added)]; see also *In re Smith* (9th Cir. 2002) 289 F.3d 1155, 1157 ["in order to receive actual damages for a TILA violation, i.e., 'an amount awarded to a complainant to compensate for a proven injury or loss,' Black's Law Dictionary 394 (7th ed.1999) . . . , a borrower must establish detrimental reliance" (italics omitted)].) If there were any violations in this case, it is clear that they were not responsible for Kinnick's failure to make the payments that were due on the promissory note or for the foreclosure on her home. Kinnick unquestionably failed to make the necessary payments long after she was fully advised of all of the terms of the loan, and there is no suggestion that she was surprised by any particular term that caused her to default.

In all events, summary judgment was properly granted because Kinnick no longer had the right to rescind the transaction after the loan was foreclosed, and as a matter of law she had no right to recover damages under her UCL cause of action.

DISPOSITION

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.